NewSouth communications®

Jake E. Jennings
Vice President of Regulatory Affairs

August 30, 2002

Michelle Carey
Chief, Competitive Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: WC Docket No. 01-321 and 01-338

Dear Ms. Carey:

BellSouth and Time Warner Telecom have proposed a "compromise" to resolve certain issues relating to unbundled network elements. The Commission should give this so-called compromise no weight in its deliberations. Typically, compromises involve both parties agreeing to give up something. Here, however, neither party appears to have given up anything. As others have already pointed out, Time Warner does not utilize UNEs.[1] As for BellSouth, it has "comprised" by agreeing to certain reporting requirements and standards for special access services, which, in practical effect, vary little from that which BellSouth already provides. Moreover, BellSouth offers no remedies for failing to meet these performance standards. It is therefore difficult to discern where the "compromise" lies.

The BellSouth/Time Warner proposal is also substantively flawed. BellSouth and Time Warner offer three proposals to restrict the use of UNEs: sunset (at some unspecified time) unbundled switching for any business customer; eliminate unbundled transport between any two points as long as there are at least three collocated carriers in only one of the end points; and, continue the current anticompetitive local usage restrictions on obtaining UNEs in place of tariffed special access facilities. None of three prongs of the BellSouth/Time Warner UNE proposal is supportable.

Drawing the line for unbundled switching between residential customers and business customers is overly simplistic, ignores market realities and will leave carriers impaired in their ability to provide competitive service to small businesses, particularly in smaller markets. The BellSouth and Time Warner proposal makes no distinction between businesses using a few lines and those using hundreds of lines. But the distinction is critical in determining impairment without access to unbundled switching. As the record developed in the triennial review proceeding amply demonstrates, without access to unbundled switching, carriers are impaired in their ability to provide service to smaller business that do not have sufficient volume to warrant aggregating lines into a DS1 level of service. Indeed, Time Warner's business plan is an implicit acknowledgement of this fact. It provides facilities-based service to entities with substantial volumes of traffic, such as other carriers, universities, governments and hospitals.[2]

[1] See Letter from Jason Oxman, Vice President and General Counsel Covad, to Michelle Carey, Chief, Competitive Policy Division, August 27, 2002 (Covad ex parte), at n.2; Letter from Ruth Milkman to Marlene Dortch, Secretary, Federal Communications Commission, August 28, 2002 (WorldCom ex parte).

[2] See Time Warner Telecom Inc. 2001 Form 10-K at 11 (located at http://www.twtelecom.com/documents/Announcements/Financial_Docs/10k.pdf.)

The proposal to eliminate unbundled transport where three, facilities-based carriers are collocated in either the A or Z end point offices is equally problematic. As explained in the Covad *ex parte*, the existence of carriers at one end point of the required route provides little relevant evidence of impairment.[3] The only meaningful evidence for impairment purposes is whether other carriers have alternative facilities available between the central offices to which the requesting carrier requires transport.

Finally, BellSouth and Time Warner propose to perpetuate, and indeed expand, the current anticompetitive local usage restrictions on converting special access to UNEs. The restrictions would be expanded by applying them to new facilities as well as to the conversion of existing special access circuits. The triennial review record is replete with evidence of the harmful effects wrought by the current usage restrictions, and in particular by the anticompetitive manner in which these restrictions have been wielded by the incumbent LECs. Worse yet, the BellSouth/Time Warner proposal does not address commingling, which has been used so effectively by the ILECs to force inefficiencies on competitive carriers and hinder competition. By failing to eliminate commingling restrictions, while at the same time eliminating unbundled transport, the proposal creates the nightmare scenario of carriers having to rely ever more on ILEC tariffed special access facilities for transport, but being unable to use those facilities in conjunction with unbundled local loops.

As its contribution to the compromise, BellSouth offers to abide by special access performance metrics similar to those proposed by the Joint Competitive Industry Group ("JCIG"), albeit with watered down performance standards. On closer inspection, however, BellSouth's offer is a hollow one. As explained in a recent BellSouth *ex parte,* BellSouth already reports on a number of these metrics.[4] Moreover, when BellSouth believes that the performance standard related to a particular metric proposed by the JCIG is too stringent, BellSouth jettison's the JCIG's standard and incorporates into BellSouth/Time Warner proposal the far less stringent standards contained in BellSouth's unilaterally imposed tariffs.[5]

More problematic is that fact that the BellSouth/Time Warner performance plan is toothless. They have proposed no remedies or penalties for BellSouth's failure to comply with the performance standards. The failure to propose remedies is particularly worrisome given the remedies contained in BellSouth's tariffs that BellSouth recently touted to the Commission as "market based" performance guarantees and evidence of the competitiveness of the special access market.[6] In fact, BellSouth's tariff remedies are woefully inadequate.

In its August 26th *ex parte*, for example, BellSouth included the remedy provisions from two of its contract tariffs issued after BellSouth won pricing flexibility. See Section 25 of Contract Tariff 006, Section 25 of Contract Tariff 007, submitted as part of BellSouth's August 26th *ex parte*. Under those tariffs, carriers are not eligible for any remedy for poor performance unless they purchase substantial amounts of special access services, $18.2 million under contract tariff 006 and more than $68.2 million under contract tariff 007. NewSouth purchases a significant amount of BellSouth special access services, but not nearly at the levels required to qualify for remedies under these tariffs. Carriers such as NewSouth would, therefore, be without recourse for BellSouth's poor performance.

Even for those carriers that do qualify for the remedy, the amount of any credits is miniscule under the complicated formulas devised by BellSouth. For example, under contract

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[3] See Covad *ex parte* at 1-3.
[4] See Letter from William Jordan, Vice President-Federal Regulatory, BellSouth, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, August 26, 2002 (BellSouth August 26th *ex parte*) (attaching a presentation entitled BellSouth Access Performance Measurements, August 23, 2002, CC Docket No. 01-321, Presentation by BellSouth August 23, 2002).
[5] See JCIG Performance Measurements and Standards – BellSouth TWTC Framework SLA Measurements and Standards, attached to the BellSouth August 26th *ex parte*,.
[6] See BellSouth August 26th *ex parte*.

tariff 006, assuming the carrier met the $18.2 million requirement, the *maximum* monthly credits that the carrier could obtain is $15,167. But even this number is highly misleading. To reach that level of credits, BellSouth would have to miss each of four metrics to the maximum extent possible. A more realistic example of what BellSouth's customer might receive for poor performance is contained in section 25.8.1(G)(5)(d) of the tariff. Under this example, if BellSouth missed the due date on 12% of the customers' special access orders in a month, BellSouth's $18 million customer would be entitled to a whopping credit of $663.56. As another example, if six percent of new circuits fail within the first 30 days, the monthly credit totals $558.76. Moreover, the customer would not actually be entitled to any credits until the end of the contract year.

The point of demonstrating the inadequacies of BellSouth's tariffed remedies is not to undertake a collateral attack on the tariffs, but to highlight the critical gap in the BellSouth/Time Warner proposal created by their failure to propose any remedy scheme to which BellSouth would agree. In the absence of a proposed remedy plan, BellSouth can be expected to default to its woefully inadequate tariffed remedies.

NewSouth recognizes that the Commission faces difficult issues in the triennial review proceeding, and creative, reasonable solutions are welcome. The BellSouth/Time Warner Telecom proposal, however, should be seen as a non-starter.

Respectfully Submitted,

/s/ Jake E. Jennings

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